

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

LAWRENCE RODRIGUEZ, ROSE MARIE NEAL, JASON BROWN, and GREG MIERA, on behalf of themselves and other present and former City employees,

Plaintiffs,

vs. No. CIV 07-0901 JB/ACT  
CITY OF ALBUQUERQUE,  
Defendant.

Transcript of Motion Hearing before The Honorable  
s O. Browning, United States District Judge, held in  
querque, Bernalillo County, New Mexico, commencing on  
day, June 9, 2009, at 10:02 a.m. and concluding at  
3 a.m. Proceedings recorded by mechanical stenography;  
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1                   THE COURT: Good morning, everyone. I appreciate  
2 everyone making themselves available to me this morning.

3                   All right. The Court will call Lawrence Rodriguez,  
4 et al., versus City of Albuquerque, Case Number 1:07CV0901  
5 JB/ACT.

6                   Counsel will enter their appearances.

7                   MR. BREGMAN: Sam Bregman and Paul Livingston on  
8 behalf of plaintiffs. Good morning, Your Honor.

9                   THE COURT: Mr. Bregman, Mr. Livingston, good morning  
10 to you.

11                  MR. BERGMANN: Ed Bergmann and Mike Garcia on behalf  
12 of the City, Your Honor.

13                  THE COURT: Mr. Bergmann and Mr. Garcia, good morning  
14 to you.

15                  All right. We're here on the two motions, one filed  
16 by each side. Why don't we take up the motion for  
17 collective-action certification first.

18                  Mr. Bregman, if you wish to speak in support of that  
19 motion.

20                  MR. BREGMAN: Your Honor, I think this is fairly  
21 straightforward. I don't have a lot to add other than what was  
22 filed with the Court as far as written briefs are concerned.

23                  THE COURT: I guess the thing that, as I worked on  
24 this yesterday -- it was kind of the first opportunity I had to  
25 spend some time with it -- was particularly the jurisdictional

1 issue. That always concerns a federal Court. Your response is  
2 primarily that the offer here is not -- doesn't match the  
3 theory that you have in this case?

4 MR. BREGMAN: That's correct, Judge. It doesn't --  
5 It doesn't compensate our clients for the alleged --

6 THE COURT: Is the offer that's being made consistent  
7 with the judgment in the Chavez case? Is that basically what  
8 the City did here?

9 MR. BREGMAN: I think that's -- to some extent,  
10 that's probably correct, Your Honor, in that they just simply  
11 wanted to compensate for what the judge did find as far as the  
12 City was liable for, and they completely ignored our other  
13 argument, as far as what the specific -- the multiplier effect  
14 and what the actual money would be owed.

15 Now, Your Honor, what I would suggest to you, Your  
16 Honor, is that four -- only having four named plaintiffs  
17 instead of the collective action, if you find otherwise, Your  
18 Honor, that we have met our burden as far as proving that they  
19 don't calculate the rate. Where does that put us? We have  
20 people that have opted in and they get to go all the way back  
21 to the opt-in date.

22 THE COURT: That's not an issue that I need to deal  
23 with today, right?

24 MR. BREGMAN: No.

25 I mean, that's just -- At the end of the case, I

1 mean, plaintiffs may win, they may loose, and everybody -- if  
2 we do it as four individuals or if we do it as 200, that's an  
3 issue that I don't reach at this point. Is that fair to say?  
4 I don't make any -- I don't make any judgment on the merits at  
5 this point?

6 MR. BREGMAN: Not on the merits, no, Your Honor. I  
7 would agree with that. Yes.

8 THE COURT: So what you're saying is that to find  
9 that I don't have jurisdiction at this point would be -- with  
10 the offer that's being made, I'd be getting into the merits as  
11 to whether it's correct or not?

12 MR. BREGMAN: You would, Judge.

13 THE COURT: All right.

14 MR. BREGMAN: I really don't have a whole lot more.

15 THE COURT: Well, let's hear what Mr. Bergmann says,  
16 and then I may have some more questions of you, Mr. Bregman.

17 MR. BREGMAN: Certainly.

18 THE COURT: Thank you, Mr. Bregman.

19 Mr. Bergmann.

20 MR. BERGMANN: Thank you, Your Honor.

21 In terms of the jurisdiction, what the City did here  
22 in the offer of judgment, which was to --

23 THE COURT: Why don't you -- Why don't you -- So I  
24 know if I have the facts firmly in front of me, tell me what  
25 you did, so I know what you did.

1                   MR. BERGMANN: Okay. What we did, Your Honor, was  
2 the Court in Chavez found that the only issue relative to the  
3 City's compliance with the Fair Labor Standards Act related to  
4 the inclusion of proceeds of sale-backs, Your Honor.

5                   And a sale-back is a situation where an employee is  
6 allowed to, in effect, sell back to the employer -- in this  
7 case the City -- a certain amount of the vacation benefit or  
8 sick leave that the individual employee has on the books. And  
9 so under the various union contracts employees are given an  
10 opportunity at one time in the year, Your Honor, to sell back  
11 excess vacation and/or sick leave. And there are certain  
12 restrictions on it, in terms of how much they get for the  
13 sale-back, but it's a sale-back, Your Honor. And I don't think  
14 the Court need to concern itself with whether it's one per one,  
15 one-half per one. I don't think that's the issue.

16                  The issue is whether or not that's included. And the  
17 Court found that the City should have included that in the  
18 calculation of overtime for those employees who actually did  
19 sell back benefit time for cash. Some sold back sick pay for  
20 additional vacation time, there was no money, so it's only  
21 those who sold it back for cash.

22                  As Your Honor might know, there's two appellate  
23 courts who have looked at that issue. They're both two-to-one  
24 decisions and they're opposed. It indicates how clear the  
25 Court -- how money or whatever.

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1           But, in any event, because of that the City made an  
2 offer of judgment based upon inclusion of the sale-back  
3 proceeds in the regular rate calculation. And how the City did  
4 that, Your Honor, was as follows: Once a year an employee is  
5 allowed to sell back the benefit time. So the City took as the  
6 appropriate period a one-year period, because the regulations  
7 say that when you have a delayed bonus payment, which the Court  
8 called this a bonus, you essentially look at it in relationship  
9 to the period of time it covered, which is what the City did.

10           So the City looked at the hours that had been paid in  
11 that year, divided it into the bonus amount times .5, times the  
12 number of overtime hours worked, which is the precise formula,  
13 Your Honor, set out in the regulations for a backward-looking  
14 bonus, which is what we have here, because it's benefit time,  
15 Your Honor, that's already been accrued or earned in the past  
16 and it's being sold now. So it's a backward-looking bonus.

17           We felt the one-year period was appropriate because  
18 it's done once a year, and we divided it out pursuant to the  
19 regulations. Half-time formula -- which, of course, I know  
20 plaintiffs argue. The only problem with their position is  
21 there's not a single court, federal court in the United States  
22 that supports their position, not a single one, Your Honor,  
23 including the case in Chavez.

24           So we followed that, we made the offer --

25           THE COURT: Here's my question, though.

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1 MR. BERGMANN: Sure. Sure.

2 THE COURT: That's what concerns me, is, can I really  
3 reach the issue of -- I mean, it may be that their position's a  
4 loser, but can I -- can I decide that it's been mooted out if  
5 their claim is broader than what your offer is?

6 MR. BERGMANN: Their claim is essentially without  
7 legal merit. I guess what the City did is it made an offer  
8 consistent with applicable law. Now, does the Court need to  
9 look at that?

10 THE COURT: You would agree with me, though, that  
11 their claims are broader than what Judge Herrera decided in  
12 Chavez was the appropriate relief?

13 MR. BERGMANN: Exactly. They are. They are -- They  
14 are, Your Honor, simply because, in our view, that's what the  
15 law provides for, and the offer of judgment is based upon the  
16 applicable case law as we see it, not only Judge Herrera's  
17 decision, but all the other cases that have looked at the  
18 issue.

19 THE COURT: So, therefore, your offer of judgment is  
20 more narrow than their claims?

21 MR. BERGMANN: The offer of judgment is, Your Honor,  
22 more narrow than the claims.

23 THE COURT: Do you have any case law on this  
24 situation, where the offer of judgment may be consistent with  
25 some other rulings but these plaintiffs are bringing broader

1 claims and whether that moots out the case and the Court then  
2 loses jurisdiction?

3 MR. BERGMANN: I think any offer of judgment -- I  
4 don't -- I think the cases that talk about mootness when you're  
5 dealing with an offer of judgment, it's always based on certain  
6 assumptions. No matter what you do, it's got to be based on  
7 certain assumptions, and I -- Is there a case that specifically  
8 is like this case? This case has a lot of unique aspects, and  
9 I would tell you, Your Honor, no, there's not a case that has  
10 the precise same unique aspects this one does, Your Honor.

11 THE COURT: Are we -- On this mootness issue, this  
12 jurisdictional issue, are we just down to the Seventh Circuit  
13 case and then maybe one other district court that have had that  
14 situation, or is this something that in this FLSA area is very  
15 common? Or is it just those two cases?

16 MR. BERGMANN: I think we're down to those cases. I  
17 would say that this case, again, is not very common, Your  
18 Honor. In some 40 years, I've never had a similar situation to  
19 this one. So it's unusual.

20 THE COURT: And what is it about this one that's  
21 unique?

22 MR. BERGMANN: The unique aspect is that we've had  
23 another case on precisely the same issues filed within about  
24 six months, Your Honor, of a notice going out in the first  
25 case, and I've never seen that happen before.

1                   THE COURT: Is that because what normally happens in  
2 these cases is everybody deals with the first case, everybody  
3 either opts in or decides not to participate in the case at  
4 all? And what's unusual about this situation is you had a case  
5 in Santa Fe, some opted in, and then another case came along  
6 and people opted into it? Is that what's unusual?

7                   MR. BERGMANN: Well, what's unusual is that the  
8 precise issue was litigated and there was a preliminary ruling  
9 and I think the plaintiffs mistakenly thought that the decision  
10 went further than it did, and so they sought to bring more  
11 people into the case to collect, so to speak, and because of  
12 that the -- we had additional people join in because they  
13 thought there was money to be collected.

14                  And the issue is one sole issue: Does the City of  
15 Albuquerque correctly pay overtime compensation, correctly  
16 calculate it? That's the issue. It's an overriding issue, and  
17 it's very unusual, in my experience, and I've never seen it  
18 before, where you had two cases brought on absolutely the same  
19 issue by the same attorneys after a trial and a ruling by the  
20 Court on the -- you know, on the issue what was continued.

21                  Usually, you litigate the issue to the end and then  
22 either the -- one side or the other side wins on the issue.  
23 You don't get multiple cases brought on an issue that is this  
24 singular in nature. In other words, does the City of  
25 Albuquerque correctly calculate overtime compensation under the

1 Fair Labor Standards Act?

2                   And that's an overriding issue, Your Honor. It  
3 covers everything as we see it. We had a trial on it, there  
4 was an initial ruling, there then was a trial, the Court issued  
5 a ruling following the trial on the -- on those issues, and --  
6 You know, it's -- certainly the plaintiffs can bring the case  
7 to the Tenth Circuit, but it's just very unusual in this  
8 context.

9                   THE COURT: What is the -- What is the posture of the  
10 case up in Santa Fe?

11                  MR. BERGMANN: Well, it's pending, actually, down  
12 here before Judge Herrera, and we were going to have a hearing.  
13 The judge had scheduled a hearing on damages to discuss that  
14 issue with counsel, and, unfortunately, a key representative to  
15 the City -- obviously, this is a payroll issue, Your Honor, and  
16 the payroll person most familiar with it had a medical  
17 situation with her brother that made it impossible for her to  
18 attend, and we indicated that, and counsel understood it, they  
19 agreed -- I think we conduct ourselves as officers of the court  
20 in those matters -- and so that hearing has been put over into  
21 September in front of Judge Herrera. That's only as to the  
22 damages issue, not at to the merits of the legal issue of  
23 liability, does the City do it correctly or not. Judge Herrera  
24 has completed her rulings on that issue.

25                  THE COURT: All right. Let's assume that I look at

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1 the issue and I determine that I don't think that the claims  
2 here are mooted. I mean, just putting aside the Chavez case.

3 MR. BERGMANN: Sure.

4 THE COURT: And you're welcome not to do that, but  
5 I'm trying to figure out what I do with this case. Assume that  
6 I decide that the offers here are more narrow than the claims  
7 so that I can't say that it's moot, that there is something  
8 that's here. It may be it may not have a basis in law or fact,  
9 but I need to decide that on the merits, rather than saying  
10 it's just moot.

11 What would be the problem or what do you perceive the  
12 problem of doing that on a class basis rather than just with  
13 the four people that are here?

14 MR. BERGMANN: Well, the problem, Your Honor, is  
15 discovery is closed and the individuals -- we're going from  
16 four individuals to some 220, and there may be some other  
17 issues that relate to the other 220, such as their claims in  
18 this. And, you know, we went through a trial. And I think  
19 that if you're going to add -- change the complexity of a case  
20 from four, that's one thing to review the payroll histories of  
21 four individuals. We did do that, we prepared for it.

22 When we get into the payroll histories of 220, if  
23 necessary, it's a totally different issue, and particularly  
24 with no discovery. I think courts --

25 THE COURT: Let me ask you this on that, because I

1 think that's a legitimate concern as to where we find ourselves  
2 in this case. And I'm not sure why we find ourselves at this  
3 point without discovery in the case, so you can address that if  
4 you'd like.

5           But let's just assume that we are at that point and  
6 with a trial in August. Don't you have all the cards on your  
7 side because you have all the records of their payroll history?  
8 I mean, I could understand that if it were the plaintiffs  
9 saying, "We haven't had any discovery in this case," but it  
10 would seem to me that you're the one that's in control of all  
11 of that.

12           MR. BERGMANN: Well, we are in control.

13           THE COURT: What discovery, really, would you need  
14 from the other side?

15           MR. BERGMANN: Well, I think the situation is, we're  
16 in control of it, Your Honor, but you're looking at 220 people  
17 going back a certain number of years, payroll looking at the  
18 records to try to decide, Are we going to have sample  
19 plaintiffs or not? Are we going to leave it with the four  
20 plaintiffs; they'll be the only ones to testify? That's fine.  
21 But if we have to go through the payroll records of all of  
22 those individuals to review them in this, that is going to be a  
23 fairly extensive undertaking just for the City to be prepared  
24 from its own standpoint.

25           You have to know what case you're trying. And if

1 you're -- We have legal theories, and that's part of the  
2 problem here, is we keep trying the legal theory over and over  
3 again as to hundreds of people, going through their records,  
4 making sure that, again, there's no issue there so we don't  
5 have something pop up at the last second and they say, "Well,  
6 look at this. What does this mean?"

7 THE COURT: Well, educate me a little bit. Is the  
8 issue that is going to have to be decided in this trial -- And  
9 it sounds like damages may be a separate issue, given the way  
10 that Judge Herrera did her case, but is the big issue at the  
11 beginning this legal issue about what is owed?

12 MR. BERGMANN: Yeah, we're going through the same  
13 exercise we went through with Judge Herrera, that's right.

14 THE COURT: Tell me a little bit about that case.  
15 Was that one in which it was important to know what the  
16 individuals in that trial did or didn't do, or was it strictly  
17 looking at the contract and looking at -- looking at the  
18 regulations and that sort of thing? Was it more of that  
19 nature?

20 MR. BERGMANN: No, it wasn't. In fact, Your Honor,  
21 Judge Herrera painstakingly went through individual payroll  
22 records to satisfy herself that, in fact, the City was in  
23 compliance. So she actually went through the records of the  
24 individuals who testified before her.

25 THE COURT: And how many people testified?

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1 MR. BERGMANN: I'm going to say there was about five  
2 or six.

3 MR. BREGMAN: Five.

4 MR. BERGMANN: Five. Five. I'm corrected by  
5 counsel. Five individuals. She went through their records, I  
6 think with a fine-tooth comb, Your Honor, in analyzing it to be  
7 sure. And it appears that by the Amended Complaint plaintiffs  
8 are talking about this Court doing the same thing, going  
9 through the exact same exercise, as far as we can tell, which  
10 is --

11 THE COURT: With just different plaintiffs?

12 MR. BERGMANN: Pardon me?

13 THE COURT: With just different plaintiffs?

14 MR. BERGMANN: Yeah, with just different plaintiffs.  
15 I mean, the same payroll records. I mean, they're the same  
16 calculation system, absolutely the same, no difference there,  
17 just different names. And I think that the dimension of that  
18 between four and 224-plus or so is quite big. And that,  
19 obviously, is a concern to the City.

20 THE COURT: Now, Judge Herrera's case had 750?

21 MR. BERGMANN: I think it had somewhere in the  
22 neighborhood of 700-plus individuals.

23 But what you do in these cases is you usually, during  
24 the course of discovery, work out sample individuals, because  
25 the Court is going to say, We're not going to go through

1 payroll records of 200, let alone 700 individuals going back  
2 several years, pay period by pay period, looking at it,  
3 figuring it out, understanding, because one of the things that  
4 happens is, in order to understand the calculation, you look at  
5 several different screens to see the steps that the system  
6 takes to reach a final result here. And that, you know,  
7 process certainly has been, you know, went through in the  
8 discovery and the depositions of the individuals from payroll  
9 who explained the process in this.

10 So it is -- It's in some respects straight forward  
11 and in other respects it's somewhat complicated.

12 THE COURT: If we were to put aside Judge Herrera's  
13 case and this was the first case that was filed, this is the  
14 first time that this issue was before a Court, what would be  
15 occurring at this hearing today? What would be happening?

16 MR. BERGMANN: Okay. We would be -- What would be  
17 occurring is, this would be a hearing in which some preliminary  
18 discovery would have occurred relative to the similarly  
19 situated nature, relative to the issues, the process that the  
20 City goes through in paying overtime, understanding the  
21 calculation system that the City has and how common -- its  
22 commonality to everyone. We would have taken initial  
23 discovery, just as we did in Judge Herrera's case.

24 THE COURT: And the reason that that's being skipped  
25 over at this point is because the plaintiffs have taken the

1 position that, Judge, you don't need to do that because the  
2 City agreed that there was commonality issues in Chavez, so  
3 there's no need to do that here? Is that basically --

4 MR. BERGMANN: You know, I'm actually not sure what  
5 the plaintiffs' position is in this case other than they want  
6 to try to get another judge to look at the issue. They don't  
7 like what Judge Herrera did and are hoping another judge will  
8 see it differently. I mean, I don't know that there's anything  
9 other than that, because the issue is -- and everybody agrees,  
10 the issue's the same.

11 So I think what they want to do is sort of skip all  
12 the preliminaries and get -- and get an opportunity to sort of  
13 say Judge Herrera was wrong and let's come up with a different  
14 result. At least from our standpoint. And, obviously, I'm not  
15 authorized to speak for them, and I don't.

16 THE COURT: Well, let me make it more comfortable for  
17 you to speak for the City. If I were sort of the Judge Herrera  
18 and the first judge on this, what would the City be doing with  
19 this case?

20 MR. BERGMANN: Well, what the City would do is what  
21 they did in Judge Herrera's. They would present the  
22 calculation system that they used, make sure that the Court  
23 fully understood that calculation system, and present that --  
24 present examples to the Court of the calculations, how they  
25 actually work in practice, because our position is that people

1 always are paid consistent with the act, no matter what, and  
2 so --

3 THE COURT: So would you be -- Would you be opposing,  
4 though -- Would you be opposing collective-action  
5 certification?

6 MR. BERGMANN: Not in the first instance, no. And we  
7 didn't. And the reason for that was, it is a common issue. We  
8 did not disagree with that. We did not oppose a collective  
9 action, because the City, obviously, wants to make sure it pays  
10 employees fairly, Your Honor. We wanted to make sure that the  
11 system that we had was fair and that it was compliant, so we  
12 had no objection in the first case to having it proceed as a  
13 collective action on behalf of all of the City employees,  
14 because they were all -- all the nonexempt employees were paid  
15 under the precise same system. There were no differences.

16 There were different overtime standards between  
17 public safety and nonpublic safety, but the system of comparing  
18 what they were paid under City policy or union contract with  
19 what the Fair Labor Standards Act required was done  
20 consistently in those areas where there was a question.

21 THE COURT: Well, if we're stuck with this second  
22 case and I don't believe that it's moot, what would -- what,  
23 then, is served by not making this a collective action?

24 MR. BERGMANN: I think the only thing would be that  
25 we would have to look at what that would mean for a trial and

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1 really sort of analyze it, Your Honor, fairly so we don't  
2 confront the Court with a situation which is unmanageable.  
3 That's really our fear, because it's a technical issue.

4 THE COURT: So if I decide that it's not moot and  
5 that we do have this case and it's not going to go away, you  
6 don't oppose collective action, but you're concerned about the  
7 mechanics and how that's going to take place? Is that fair?

8 MR. BERGMANN: I think that's fair to say, yes.  
9 Because I think the mechanics are, you know, important to it,  
10 and if it could be streamlined in this and there can be, you  
11 know, some work in streamlining it, given that we've already  
12 been through this once, then I think the City would -- you  
13 know, it would certainly be willing to work toward that. But I  
14 think the problem is having something that's unmanageable at  
15 this late date.

16 I mean, certainly plaintiffs could have moved for  
17 class certification, as they usually do, very quickly. In  
18 fact, in one of the Moodis cases the Fifth Circuit pointed out  
19 that one of the things the Court's going to look at is how  
20 diligent were the plaintiffs at moving for collective action,  
21 so that we don't get into these issues, we're not on the eve of  
22 trial saying, is this a case of four people or is this a case  
23 of potentially 224?

24 THE COURT: What are you -- What are you -- From a  
25 mechanical standpoint -- I don't know if this is the motion or

1 the point to discuss it, but from a mechanical standpoint, what  
2 are you most concerned about? What is it that you're wanting  
3 to avoid or what can we do to address your mechanical concerns?

4 MR. BERGMANN: I think what the City's concerned  
5 about is just surprise, knowing, you know, what's really going  
6 to go on in a case that's suddenly grown dramatically and being  
7 able to respond to things that are brought up, not in  
8 discovery, but just at trial, and being able to fairly respond  
9 to it in a manner that allows an orderly trial.

10 THE COURT: And how would I as a judge help you  
11 address those concerns?

12 MR. BERGMANN: I think the Court could help in the  
13 sense that getting the parties to agree on maybe some  
14 simplifications, maybe some stipulations, because the -- at  
15 least the City's testimony --

16 THE COURT: Some evidence and things?

17 MR. BERGMANN: Exactly.

18 The City's evidence is going to be precisely the  
19 same; we've already testified it's going to be precisely the  
20 same. Maybe some stipulations, some ways to streamline it that  
21 may assist the Court. And this -- Because I don't think  
22 there's any dispute about the fact issues. I mean, the City  
23 has a way of doing it, and there's --

24 So I think if there was some stipulations relative to  
25 the City's testimony and some agreement relative -- If we're

1 going to have some sample people, then, fine, then we'd know at  
2 least what we're in for, Your Honor, and be able to plan for  
3 that and anticipate it. I think that's crucial.

4 THE COURT: All right. Mr. Bergmann, anything else  
5 you want to say on this motion for collective-action  
6 certification?

7 MR. BERGMANN: Well, I think one last point, Your  
8 Honor, is, is that another concern the City has in general,  
9 with as many employees as it has, is that there are certain  
10 standards for collective actions under Hoffman-La Roche and the  
11 Court has applied them, and those standards require that  
12 plaintiffs' counsel bring motions for collective action  
13 promptly so that the City knows what it has, what it's -- what  
14 kind of a case it's going to be defending.

15 THE COURT: Give me the background on this. I know  
16 that we've been through it before and I've been -- you know,  
17 issued some rulings in this case, but give me a little bit of  
18 the history as to how this has progressed and, I mean, kind of  
19 tell me where you would have expected this motion.

20 MR. BERGMANN: I think normally you would expect a  
21 motion for certification of a collective action is generally  
22 made within 60 to 90 days of commencement of the lawsuit.  
23 There is -- Often there's some initial discovery that's taken  
24 in the case, and then the motion is filed, and we know that the  
25 case -- how the case is going to proceed.

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1                   THE COURT: I don't disagree that normally you see  
2 these earlier, but is there -- is there anything in the statute  
3 that sets the deadlines for filing these motions or that  
4 requires them?

5                   MR. BERGMANN: You know, there really isn't, other  
6 than a desire, I think -- No, there's nothing in the statute  
7 itself that says when you should do it. I think it's more a  
8 case-management standpoint. And that's why we filed a motion  
9 to strike the consents, because you know, at some point we've  
10 got to figure out who's in and who's out. And the Court at  
11 that time indicated that it didn't strike the consents, but it  
12 certainly said the case was limited to four people, so we went  
13 on that assumption and continued to operate. And you plan for  
14 any case. Any litigation, both sides plan for it.

15                  THE COURT: All right.

16                  MR. BERGMANN: And I guess lastly we probably would  
17 think that if the Court is going to allow the collective  
18 action, that an August trial setting is probably just too soon,  
19 given where we are now.

20                  THE COURT: All right. Thank you, Mr. Bergmann.

21                  MR. BERGMANN: Thank you, Your Honor.

22                  THE COURT: Mr. Bregman.

23                  MR. BREGMAN: Just one point, Judge.

24                  The notice of opt-ins for a majority of these opt-ins  
25 was filed on October 15, 2007.

1                   THE COURT: Why didn't you move earlier for this  
2 collective-action certification, at least -- at least early  
3 enough so that there was still time to do discovery?

4                   MR. BREGMAN: Judge, I want make it clear about how  
5 this case came about, because there was some discussion about  
6 that. Judge Herrera did issue an opinion based on summary  
7 judgment motions which to this day I believe indicates that it  
8 looked like we had established that they were paying wrong,  
9 more than just the limited damages trial that's coming forward.

10                  THE COURT: Give me the date or the approximate date  
11 that she issued that.

12                  MR. BREGMAN: I don't have that specifically.

13                  THE COURT: Is it fair to say that she issued an  
14 opinion on the summary judgment, that you thought you were the  
15 big winner, and then when you went to trial you ended up being  
16 the little winner? Is that kind of what happened?

17                  MR. BREGMAN: That is what happened, Judge. And so  
18 what happened was, there was a tremendous amount of inflow of  
19 people that were calling our office saying, "I'm not in that  
20 first one," when they read about it in the newspaper, "We want  
21 to be in that other one," so we wanted to preserve their  
22 rights --

23                  THE COURT: And the opt-out period had already passed  
24 for that case?

25                  MR. BREGMAN: Exactly. And the problem is that you

1 get -- your time frame starts when you opt in on how far back  
2 you can go. It goes back three years from the date of the  
3 opt-in.

4 So, Judge, then we -- Quite frankly, I focused on the  
5 Chavez case, because that was coming up for trial.

6 Then the last hearing you had, which we discussed  
7 about some of the res judicata and collateral estoppel issues,  
8 the issue was brought up and discussed -- and that's when --  
9 after it was discussed a little bit, just touched on it in your  
10 hearing -- we decided that we needed to file it, and not too  
11 long after we filed this motion, Judge. I think that's the  
12 time frame the way it's set up.

13 As far as the length, I don't really have an answer  
14 for you. It just -- We didn't -- We didn't do it earlier.  
15 I'll just say that.

16 As far as discovery, Judge, I just want to make the  
17 record clear. As he just said, there's no facts in dispute for  
18 the most part. Okay? I don't know that there are any facts in  
19 dispute. And so, Judge, discovery I've conducted in the other  
20 case, depositions, the basic written discovery. We've also --  
21 We've got all that, and we also have trial testimony now from  
22 the other one. And, Judge, I'm someone that likes to do  
23 discovery, but I don't like to waste time doing discovery and  
24 have the same thing said over again, and so, Judge,  
25 discovery -- Mr. Livingston and I made a calculated decision

1 that we didn't believe that discovery was really necessary for  
2 anything new since, as defense counsel says, the facts are  
3 really not in dispute in this.

4 I think we know how they calculate overtime, they  
5 know how they calculate overtime, and we disagree on whether or  
6 not the law allows for it the way they do it.

7 So that's where we are, Your Honor. I think I wanted  
8 to make one last point.

9 I think you're right to focus in on whether or not  
10 their offer of judgment in the jurisdictional issue really does  
11 satisfy. And the case that they referred to in -- I believe  
12 it's Sandoz versus Cingular, Fifth Circuit, a 2008 case.  
13 There, the specific language is that fully satisfies individual  
14 claims. Their offer, as I think that counsel just stated, does  
15 not fully satisfy our claims despite what they put in their own  
16 document that it fully satisfies claims. It does not.

17 And I think that's why at the end of the day I think  
18 that there's no harm in going forward with collective action in  
19 this. And if they want to enter into some type of  
20 stipulations, Judge, and stuff like that, we'll do everything  
21 we can to streamline the trial. I have no objection to that  
22 whatsoever.

23 THE COURT: If there's really no issues in dispute  
24 and I decide that the case is not moot and that I've got to  
25 deal with this case, what do you envision -- what do you

1 envision the trial looking like? I mean, we're going to come  
2 to a motion here in a moment, and putting aside a second that  
3 it's styled as a motion for stare decisis, but is this the kind  
4 of thing that can be resolved just on a motion for summary  
5 judgment? I mean, is everybody -- is there an issue here that  
6 everybody -- I know the City doesn't want it redecided, but  
7 I've got to do something with this case. Is there just a -- Is  
8 there just a legal issue or a contract interpretation or a  
9 regulation interpretation that needs to be made in this case?

10 MR. BREGMAN: Judge, could I have 30 seconds just to  
11 consult with Mr. Livingston so I can give you an answer on  
12 that?

13 THE COURT: Sure.

14 MR. BREGMAN: Judge, first of all, what -- coming in  
15 here I had envisioned that we would do something similar to  
16 what Judge Herrera did and first take up the issue of  
17 liability, and then if there's liability, then we can talk  
18 about the intricacies of doing a damages-issue case. However,  
19 your question to me was a summary judgment question.

20 Judge, in light of the posture of this case, if this  
21 Court were to allow us to use the prior testimony at the other  
22 trial -- because I think they have a City employee who  
23 testifies -- and we have some plaintiffs who described how they  
24 were paid on their paychecks -- if that testimony could come in  
25 together with some affidavits for the summary judgment issue, I

1 would not have a problem with doing a motion for summary  
2 judgment and seeing if you believe you can decide the liability  
3 based on that.

4 We did exhibits in that trial, obviously, the union  
5 contracts, things of that sort, we did payroll sheets. I would  
6 have no complaint, if defense counsel would agree to it, to do  
7 a motion for summary judgment on this -- this perhaps is a  
8 better use of the Court's time -- because there are facts that  
9 came out in the other trial that we can just use for the  
10 summary judgment. So I would have no objection to doing it  
11 that way together with some affidavits, because that may be the  
12 best judicial economy, if you will, for handling this case.

13 THE COURT: Well, let me ask -- Let me ask this.  
14 Mr. Bergmann suggested stipulations of fact. I mean, I think  
15 what I hear Mr. Bergmann being most concerned about is he  
16 doesn't want to be surprised, he wants to -- he doesn't want to  
17 show up for a trial or a summary proceeding or something and  
18 something that he didn't anticipate, either a representative  
19 witness or a representative plaintiff or something show up.

20 Are you committed to trying to address that concern  
21 with Mr. Bergmann to try to set down and eliminate as much as  
22 reasonably possible that sort of fear that he has?

23 MR. BREGMAN: I am, Your Honor. And perhaps if the  
24 Court would want us to, I would be willing to agree that in the  
25 next 45 days or so, that we can see if we can't get together

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1 and stipulate exactly to what the facts are based on prior  
2 testimony and based on everything else and then perhaps provide  
3 it to you in written briefs, and then you can set it for a  
4 motion hearing, if you'd like. That seems to me that that  
5 would be fine.

6 I've worked well with Mr. Bergmann and Mr. Garcia,  
7 and I have no problem doing that whatsoever. And I would be  
8 happy to, if you give us some kind of deadline to do it under,  
9 that we sit down and we stipulate to everything that we can,  
10 and then we can determine -- and then if you want, we can do a  
11 summary judgment motion based on the agreed stipulation.  
12 Because there is a court record already of what they're  
13 claiming and what we're claiming. There's depositions and  
14 there's other -- So I -- If -- I mean, he mentioned it. There  
15 is no disputing the facts. It's applying it.

16 THE COURT: All right. Anything further,  
17 Mr. Bregman?

18 MR. BREGMAN: No, Judge. Thank you for your time.

19 THE COURT: Thank you.

20 Mr. Bergmann, let me ask you, after listening to that  
21 exchange, any thoughts here as to -- does any of that address  
22 the City's concerns?

23 MR. BERGMANN: I think a lot of it does, Your Honor.  
24 Certainly, the idea would not be to try the exact same issue  
25 again. I don't think that serves anyone's purpose. To the

1 extent that we can stipulate based upon a trial record before  
2 Judge Herrera, I think that would be very helpful. We're  
3 certainly willing to look at that.

4 Mr. Bregman mentioned some affidavits. We'd  
5 certainly want to know what they were going to be and that to  
6 make sure that nothing else came up.

7 But, yes, it sounds like a workable plan to sit down  
8 and go over the transcript from the trial before Judge Herrera  
9 and the testimony that was given there by the people who did  
10 testify there. I think that would be helpful. Because it's  
11 going to be -- I think it's going to be pretty much of the  
12 same, anyway, and it seems to me it would be much more  
13 efficient, since we have a trial record, to use that.

14 THE COURT: All right.

15 MR. BERGMANN: I would suggest 60, rather than 45  
16 days, just being realistic, Your Honor, in terms of the work  
17 ahead of us in this, but that's something that we certainly  
18 would be willing to work with Mr. Bregman. I mean, obviously,  
19 you know, we've worked together, and I think we've conducted  
20 ourselves professionally throughout that time.

21 THE COURT: All right. Thank you, Mr. Bergmann.

22 Anything further, Mr. Bregman?

23 MR. BREGMAN: Nothing.

24 THE COURT: Well, I want to look at this a little bit  
25 more, but I'm inclined to think that I do have jurisdiction,

1 that the offer here doesn't moot out the claim here because the  
2 claim is broader. And for me to decide that the -- that it  
3 mooted out would be for me to prejudge the merits of the  
4 plaintiffs' claim and say, No, it's limited to what the other  
5 courts have done, or Judge Herrera's done in Chavez, and I  
6 don't think I'm at liberty to do that, so I think I would be  
7 making a merits decision before I determine whether I had  
8 jurisdiction, and I think I have to do it the other way, and I  
9 think that unless the plaintiffs' claims are fully satisfied,  
10 which I don't think the City is prepared to do here because  
11 they disagree with the plaintiffs' claims, then I think I have  
12 jurisdiction, and so the claims are not mooted.

13           I've thought about the unusual posture here, but  
14 given that I think that everyone agrees that these thousand or  
15 so workers in these two cases are common, there doesn't seem to  
16 be any reason to proliferate any further the litigation by  
17 dealing with only these four, and so I'm inclined to certify  
18 the case as a collective action.

19           So I guess I'm going to look at it a little more and  
20 satisfy myself that there's no procedural impediment, but I'm  
21 inclined to think that that's the best way to proceed, and then  
22 take other issues seriatim and deal with those to litigate the  
23 case as efficiently as possible.

24           So while I'll take this under advisement I'm inclined  
25 to grant this motion.

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1           Now, on the motion for the Court to file dispositive  
2 motion on the basis of stare decisis, here are my thoughts.  
3 I'll hear anything you want to hear on this motion. I guess I  
4 don't know enough about the case to make a determination as to  
5 whether I will follow Judge Herrera, I simply don't know enough  
6 about the merits, so I -- so I guess I'm not inclined to just  
7 say, Well, that's Judge Herrera, I'm going to follow whatever  
8 she did. If it were an appellate court that I -- had binding  
9 control over me, then I would be bound by their decision if  
10 everybody agreed that the facts here were identical, but I'm  
11 not sure that stare decisis necessarily requires me to follow  
12 Judge Herrera, and I think it's unfair to at least the  
13 plaintiffs in this case for me to make that determination  
14 without a full hearing and briefing.

15           So if that's the nature of the motion, "Judge, just  
16 follow what Judge Herrera did," then I'd be inclined to deny  
17 it, because I think it is getting very close to the privity  
18 issues that we dealt in the prior opinions on res judicata and  
19 collateral estoppel.

20           On the other hand, if what the City is asking me to  
21 do is say, "Judge, we want you to get into the merits here and  
22 look and see, and we think you will agree that Judge Herrera  
23 did the same thing, and we'd like to file a motion to that  
24 effect," I'd be inclined to grant that sort of motion, because  
25 that seems to me to -- if we can resolve this in a summary

1 fashion without a trial, then I'd be inclined to grant that.

2 Now, we have talked a little bit, as we've developed  
3 this morning, about coming up with some procedure where y'all  
4 might do something. I'm sort of hearing two different things  
5 as a possibility. One is that -- The first one is that I grant  
6 you leave to file a motion, you would file a motion for summary  
7 judgment, you'd get with Mr. Bregman and Mr. Livingston and  
8 y'all would agree on what the record is and everybody agree  
9 they just want this resolved on a summary judgment and here are  
10 the facts.

11 On the other hand, if there are factual issues in  
12 dispute and everybody knows there's factual issues in dispute  
13 and it's going to require a trial, then maybe what the best  
14 thing to do is just agree on the record, send it to me, and I  
15 set up a hearing and then I hear the legal arguments at the  
16 time.

17 I'm not adverse to giving the City leave to file a  
18 motion, but I've kind of got to tell you up front that if it's  
19 just going to be on -- if it's just on the doctrine of stare  
20 decisis I won't preclude you from filing a motion, but I'm not  
21 inclined to grant it. So I don't know if that's much guidance  
22 for you.

23 But, Mr. Bergmann, it's your motion. If you wish to  
24 speak in support of it.

25 MR. BERGMANN: Sure. Your Honor, and I understand

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1 Your Honor's position, and certainly the City is not about  
2 jousting at windmills. I think what seems to make sense is  
3 that the concept of the City is really the latter thing the  
4 Court said, is to have the Court really fully understand what  
5 the City has done, the case that was before Judge Herrera, and  
6 then make a decision on it. So it seems to me that the concept  
7 of stare decisis would probably fold into a motion for summary  
8 judgment if the parties could stipulate to everything. It's  
9 really what we're saying. And I think, based upon what's been  
10 said here, that that probably suggests a way that the Court's  
11 concerns, the City's concerns and plaintiffs' concerns can all  
12 be addressed in an efficient manner.

13 So I think our view would be, is that we would sort  
14 of try to combine our concepts of stare decisis with concepts  
15 of summary judgment based upon the full record that we've  
16 stipulated to for the Court to review. And I think that's the  
17 fairest way to deal with it, and it that seems to be the way  
18 the Court -- that seems to fit with what the Court thinks would  
19 be appropriate from the Court's standpoint.

20 THE COURT: Yes. The one thing I would caution y'all  
21 a little bit on -- I don't want to get myself into this  
22 situation. Sometimes parties come to me -- and this puts the  
23 Court in a little bit of an awkward position -- there are  
24 genuine issues of material fact, and everybody knows that, but  
25 they do cross-motions for summary judgment, hoping that I will

1 just decide the legal issue, and that puts me in a difficult  
2 position, because everybody knows the record contains genuine  
3 issues of material fact that really preclude summary judgment.  
4 Everybody still wants summary judgment, and then when the party  
5 that doesn't get the summary judgment they wanted, they go up  
6 on appeal and I've got all you these factual issues.

7 I guess if -- And y'all know this case much better  
8 than I, and I don't even pretend to know the answer to this,  
9 but if you were in front of Judge Herrera for the very first  
10 time and everybody knew that there were genuine issues of  
11 material fact and you were going to have to have a trial, it  
12 seems to me we shouldn't go through the summary judgment stage,  
13 we should probably go through maybe just an agreement on what  
14 the record is, give it to me, y'all supplement it if you want  
15 to supplement it with a short trial or a short hearing or  
16 something like that, and then we have arguments on what the  
17 real legal issues are.

18 Have you got any thoughts on that?

19 MR. BERGMANN: Yeah. I think maybe, Your Honor, as  
20 you were saying it, I thought that it's probably appropriate  
21 for counsel, who know the case best, to during this period that  
22 I mentioned, 60 days, counsel said 45, of going over and  
23 exploring it to see whether during that period, at the end of  
24 it we really feel like there are no disputed issues of fact or  
25 whether we think that at that point, having gone through it and

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1 having sat down and had discussions, counsel with counsel,  
2 about it we feel that maybe a short trial would be necessary.

3                 But it seems to me that approach is so much more  
4 efficient to really examine it and, you know, keep in mind the  
5 Court's concern that we're not masking issues. I don't think  
6 we are. I don't think in this case we are really masking  
7 issues, but it's an issue --

8                 THE COURT: On the summary judgment motion that she  
9 did earlier, what was that? Did everybody agree there was some  
10 legal issue that just needed to be decided before trial?

11                 MR. BERGMANN: Well, there were a number of different  
12 issues, Your Honor, a number of different legal issues. She  
13 resolved some, she resolved others but left others open.  
14 And --

15                 THE COURT: So she tried the ones that there were  
16 factual issues?

17                 MR. BERGMANN: Exactly. What she did is she wanted,  
18 essentially, a better understanding of the City's system, and  
19 she just felt like, I think from her standpoint, that the Court  
20 didn't have a full understanding of all the issues, and that's  
21 why she set down the remaining issues for a bench trial before  
22 the Court, and that took care of it.

23                 Some of the issues she resolved herself and took care  
24 of some of the issues. There was an issue of a bonus -- the  
25 mayor's bonus, for example. She decided that on summary

1 judgment. That was over. No disputed issue on that. But some  
2 of the other issues I think had more complexity and I think the  
3 Court just want more input.

4 THE COURT: Well, here's kind of what I'm thinking  
5 about, is denying the motion for just a motion on stare  
6 decisis, granting the motion for summary judgment if the  
7 parties can agree on a stipulated statement of facts and they  
8 agree on that and y'all decide y'all just want to proceed with  
9 motions for summary judgment, but not allow a motion for  
10 summary judgment if there's really genuine issues of material  
11 fact, and then, instead, we use the trial procedure --

12 MR. BERGMANN: Sure.

13 THE COURT: -- where y'all give me the record, and  
14 then we do it that way.

15 MR. BERGMANN: I think the last thing either side  
16 would want is to, you know, just have this thing go on and on.  
17 I think that we should be able to decide among ourselves  
18 whether we can stipulate to a record, stipulate to everything  
19 for Your Honor; and if we can't, well, then -- then we have to  
20 deal with those consequences.

21 THE COURT: Does that resolution seem appropriate on  
22 your motion here?

23 MR. BERGMANN: I think it is, Your Honor. I think  
24 we're satisfied. I think this was very helpful to sort of, you  
25 know, really discuss these issues, because they are

1 complicated.

2 THE COURT: All right. Thank you, Mr. Bergmann.

3 MR. BERGMANN: Thank you, Your Honor.

4 THE COURT: Mr. Bregman, what do you think about that  
5 resolution of this motion?

6 MR. BREGMAN: I think that's fine, Judge. You  
7 actually -- I don't want to ever say the Court misspoke, but I  
8 think you said you'd grant the motion for summary judgment.  
9 You weren't actually granting a motion for summary judgment,  
10 you were granting a motion to file a motion for summary  
11 judgment, and I just want to be clear.

12 THE COURT: What did I say?

13 MR. BREGMAN: You said you were granting the motion  
14 for summary judgment.

15 THE COURT: Yes, I'm granting a motion to file the  
16 summary judgment.

17 MR. BREGMAN: Okay. The other thing, Judge, that I  
18 just want to make sure we're clear on, because it makes it  
19 tremendously more specific and easier for everybody to work  
20 through, we're talking about -- just about the liability  
21 issues, as to whether or not it's for a summary judgment motion  
22 for this first expedited trial, if you will, or a trial on the  
23 specific agreed upon facts. We're not talking about damages  
24 for each single plaintiff right now.

25 THE COURT: Is that what you're thinking,

1 Mr. Bergmann?

2 MR. BERGMANN: I'm thinking that they would be  
3 liability issues. And I understand the Court to be saying that  
4 on granting the motion for leave to file a motion for summary  
5 judgment it would be in connection with this process that  
6 Mr. Bregman initially described.

7 THE COURT: So y'all seem to be in agreement on that  
8 and I won't interfere with that.

9 MR. BREGMAN: I think we are, Your Honor. And I just  
10 want to say that I know that you're basically saying that they  
11 can file a motion for summary judgment, but, obviously, part of  
12 our motion and response is a motion for summary judgment going  
13 back the other way, in essence. I just want to make sure that  
14 that's clear.

15 MR. BERGMANN: Well, we clearly understood that both  
16 sides would be filing those motions.

17 MR. BREGMAN: Okay.

18 THE COURT: Let's do this. Let me see if I can  
19 articulate this and y'all are in agreement with this.

20 I'll deny the motion just to file a motion -- and  
21 this may not have been what the City intended to do -- but just  
22 file a motion saying there's stare decisis, follow what Judge  
23 Herrera did, so I won't be granting that motion. Certainly,  
24 the City in its motion for summary judgment can argue that I  
25 should follow Judge Herrera's opinion, and I certainly will

1 look at it very, very, very carefully.

2 I will grant the City's -- and I guess what I hear  
3 Mr. Bregman saying is also the plaintiffs' request to file a  
4 motion for summary judgment to the extent y'all agree on a  
5 statement of facts on genuine issues of material fact that are  
6 not disputed. If you can't agree on that, then I think what  
7 we -- what I'll do is I'll deny a motion for summary judgment  
8 and we will proceed with a trial.

9 And if y'all can agree on the summary proceedings for  
10 the trial, such as what the evidence is and those sorts of  
11 things, great, I'm all for that. And if you need to supplement  
12 that in some way and you can agree on those procedures, that's  
13 fine. And if you can't agree on the procedures, then I suggest  
14 we regroup, because I don't want to get -- I do want -- I am  
15 concerned about prejudice to the City. I don't want them to be  
16 surprised.

17 If y'all all agree on the evidence and, "Here it is.  
18 Just, Judge, go read it," that eliminates, I think, the  
19 surprise issues. On the other hand, if we're going to have,  
20 "Here's the record, read this, but we want to present some  
21 additional evidence," then if you can satisfy Mr. Bergmann's  
22 concern about surprise, then I will just -- we'll just go ahead  
23 with the trial. If you can't, call Ms. Wild back and I will  
24 get on the phone with you or we'll reconvene and see what the  
25 specific mechanical issues are.

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1                   How does that sound?

2                   MR. BREGMAN: That sounds absolutely fine with the  
3 plaintiffs, Your Honor. I just ask that you tell us what you  
4 think would be appropriate time frames. That's all I'm looking  
5 for. Sixty days? I don't object to sixty days.

6                   THE COURT: Well, that's fine.

7                   MR. BREGMAN: Sixty days to file the summary judgment  
8 motions?

9                   MR. BERGMANN: I would say 60 says days to be sure we  
10 can agree, because I think what would be appropriate is, if we  
11 can agree on stipulated facts, I think we should report back to  
12 the Court and let the Court know, in fact, we are able to  
13 stipulate on facts, and then I think we can do a briefing  
14 schedule at that point.

15                  THE COURT: Let me -- Before I get into timetables on  
16 this, does this ruling on your motion -- does this seem  
17 appropriate?

18                  MR. BERGMANN: Yes, Your Honor, it does.

19                  THE COURT: All right. Now, here's what I would  
20 suggest we do. And this may not be what y'all are thinking of,  
21 and if y'all don't like this then, fine. But what if we set up  
22 a shorter time period just to see if y'all can agree on the  
23 statement of genuine issues of material fact? This would be an  
24 attempt to see if y'all can agree on that so that y'all -- If  
25 y'all can agree on the statement of genuine issues of material

1 fact -- if you can agree on those, then basically what you're  
2 telling each other, y'all both think this can be resolved with  
3 a motion for summary judgment and you don't have to have a  
4 trial and so we can -- we then can set up a schedule.

5           But if y'all are not going to be able to agree in a  
6 fairly short order on a statement of genuine issues of material  
7 fact that you would both put into your motion, your  
8 cross-motion, then what we're really looking at is y'all really  
9 spending your time agreeing on what the record's going to be  
10 for my trial.

11           So I was going to suggest something like 10, 15, 30  
12 days, something like that, for y'all to see if you can agree on  
13 a statement of genuine issues of material fact. If that breaks  
14 down, there's not going to be any motions for summary judgment,  
15 then you take the other 30 days to put together the record for  
16 me in this case. Then if you can agree on the record, fine; if  
17 you can't agree, you call Ms. Wild, and we'll talk to you about  
18 what the problems are or what the additional -- What I'm  
19 anticipating is that y'all may agree on a record but there may  
20 be some supplementation that you want to do and that you can't  
21 agree maybe on that.

22           MR. BREGMAN: I have no problem with that; the 30  
23 days is fine.

24           THE COURT: Do you want to do 30 and then 30?

25           MR. BERGMANN: Right.

1           THE COURT: Because at the end of 30 days you've got  
2 your genuine issues of -- your statement of genuine issues of  
3 material fact. What I would then suggest, if y'all would agree  
4 on that, file your motion within 15 days.

5           MR. BREGMAN: Okay.

6           THE COURT: It's going to be cross motions, right?

7           MR. BREGMAN: Yes.

8           THE COURT: So y'all can just file them  
9 simultaneously 15 days after you agree on that.

10          What do you think about that, Mr. Bergmann?

11          MR. BERGMANN: I'm just wondering how that affects  
12 the trial setting.

13          THE COURT: Well, give me the trial date again.

14          MR. BERGMANN: August 10th. I just think it's -- I  
15 think it's pretty tight, Your Honor, realistically. I would  
16 hate to come up at the last minute and say --

17          THE COURT: Well, what if we did this? If y'all  
18 agree in 30 days on the statement of genuine issues of material  
19 fact -- if y'all agree on that, y'all are basically telling  
20 each other and the Court, "We don't need a trial, we're going  
21 to resolve this with summary judgment because we agree on all  
22 the facts, you just rule." So you just call the Court and say,  
23 "We've reached an agreement, we're filing motions for summary  
24 judgment, they're going to come in approximately late July,"  
25 and so we'll just vacate the trial.

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1           If y'all can't agree, then we're going to trial and  
2 y'all have basically 30 -- you really have about 45 days to get  
3 ready for the trial. I don't need -- I won't -- I won't be  
4 holding y'all up on the ruling for summary judgment.

5           Does that make sense?

6           MR. BREGMAN: Yes, sir.

7           MR. BERGMANN: All right.

8           THE COURT: Well, this seems very easy. Is there  
9 anything else we need to discuss while we're together?  
10 Anything else I can do for you today?

11           Let me see. We've got the pretrial conference set  
12 for July 17th, 2009.

13           MR. BERGMANN: Yeah, I think that might be an issue,  
14 Your Honor.

15           THE COURT: All right. Let's figure out -- Today's  
16 June 9th. There's 30 days in June. So we're going to be  
17 looking at by June 9th -- July 9th you're going to know whether  
18 we're going to trial or summary judgment. Would that not be  
19 about a good day for us to get together and see if y'all  
20 have -- see if y'all know what you're doing as far as the  
21 record's concerned?

22           MR. BREGMAN: I think we ought to keep it.

23           THE COURT: Why don't we do this? Why don't we keep  
24 it?

25           MR. BERGMANN: Okay.

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1                   THE COURT: If y'all agree you don't need it, y'all  
2 can call Ms. Wild and we'll vacate it. But that will give you  
3 a full almost ten days after y'all know. Y'all probably are  
4 going to know quicker than that whether you're -- whether this  
5 summary judgment procedure's going to work. So if y'all -- If  
6 y'all start figuring out that that's not going to work and  
7 you're going to have to go to a trial, y'all may start shifting  
8 pretty quickly over to try and put the record together and  
9 then -- so that date may be about right. If it doesn't work  
10 for you, call Ms. Wild and we'll vacate it and set it at a  
11 different time. If it does work for you --

12                   And, Mr. Bergmann, I don't know if I've said this  
13 earlier, you certainly don't -- I don't want to make you come  
14 out here for short hearings and things, so don't hesitate to do  
15 these by phone if you want to do that.

16                   MR. BERGMANN: I try to do it, Your Honor, but I had  
17 a sense that today was not going --

18                   THE COURT: Well, I understand.

19                   MR. BERGMANN: -- to be a short hearing. But I do  
20 appreciate the Court's courtesy in that respect.

21                   THE COURT: Yes. Don't hesitate to do that.

22                   Ms. Wild's reminding me that one other reason we may  
23 want to keep that date is, I don't have a lot of other  
24 available dates. I've got some trials, firm settings sort of  
25 backed up and I do have the Tenth Circuit Judicial Conference

1 that I'm going to try to attend in there, too, so I'm going to  
2 be out a little bit in one of those weeks. So the nice thing  
3 about having that date is, I'm committed to be being here and  
4 for you, so we might hang on to it for that reason.

5 All right. Anything else we need to discuss?  
6 Anything else I can do for you today?

7 Mr. Bregman?

8 MR. BREGMAN: No. Thank you, Judge.

9 THE COURT: Mr. Bergmann?

10 MR. BERGMANN: Thank you. We appreciate your  
11 attention to this matter.

12 THE COURT: All right. Appreciate your assistance on  
13 this matter.

14 Call Ms. Wild if there's anything we can do and just  
15 get on the phone and try to work through some of these issues.  
16 Let me know.

17 I'll try to get you opinions and orders out on these  
18 issues. I did take that first one under advisement. I'm  
19 pretty confident I know what I'm doing on that, but I do want  
20 to look at a few matters. But be a little patient with me.  
21 I've got just some enormous commercial cases lined up this  
22 summer, some class actions and things, so I'm working through a  
23 number of them and they're taking -- they're taking some  
24 stretches of time, so I'll try to get them there, but be  
25 patient with me. All right.

1 MR. BERGMANN: This area of law requires patience,  
2 Your Honor.

3 THE COURT: Yes. They're not FLSA cases, but they're  
4 two enormous securities cases. One of them was this  
5 Westland -- you probably don't know a lot about the area, but  
6 this Westland case, and then I've got the Thornburg cases, so  
7 I've got a pretty full platter here this summer.

8 All right. Y'all have a good day.

9 (Court stood in recess at 11:08 a.m.)

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1 C-E-R-T-I-F-I-C-A-T E

2 UNITED STATES OF AMERICA

3 DISTRICT OF NEW MEXICO

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5 I, Danna Schutte Everett, RPR, CCR, CRR, Official  
6 Court Reporter for the State of New Mexico, do hereby  
7 certify that the forgoing pages constitute a true  
8 transcript of proceedings had before the said Court held  
9 in the City of Albuquerque, New Mexico, in the matter  
10 therein stated.

11 In testimony whereof, I have hereunto set my hand on  
12 this 22nd day of July, 2009.

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24 June 9, 2009, Rodriguez vs. City of Albuquerque

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